U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 10 November 2004

Case No. 2004-BLA-5308

In the Matter of

VERL W. HUFF,
Claimant

v.

PRICE RIVER COAL COMPANY,
Employer

and

AMERICAN ELECTRIC POWER COMPANY,
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-In-Interest

Appearances:

Jonathan Wilderman, Esquire
For the Claimant

William J. Evans, Esq.
For the Employer

BEFORE: RICHARD K. MALAMPHY
Administrative Law Judge

DECISION AND ORDER – AWARDING BENEFITS

This case arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977 (hereinafter referred to as "the Act"), 30 U.S.C. § 901 *et seq.*, and the regulations issued thereunder, located in Title 20 of the Code of Federal Regulations ("C.F.R."). Regulation section numbers mentioned in this Decision and Order refer to sections of that Title. Benefits are awarded to persons who are totally disabled within the meaning of the Act due to pneumoconiosis, or to

survivors of persons who died due to pneumoconiosis. Pneumoconiosis is a chronic dust disease of the lungs arising from coal mine employment and is commonly known as black lung.

Procedural History

The claimant, Verl W. Huff ("Claimant" or "the miner"), filed his claim for benefits on January 22, 2002. (DX 3). Price River Coal Co., ("Employer") was notified of the claim and filed a timely response and controversion. (DX 21 & 21). A Schedule for the Submission of Additional Evidence was issued by the District Director, Office of Workers' Compensation Programs ("OWCP") on December 6, 2002 finding that if a decision were made at that time, Claimant would be entitled to benefits and that the named employer is the properly designated responsible operator. (DX 22). The District Director further found that Claimant was employed as a coal miner for thirty-seven (37) years. (DX 22). In response, Employer submitted a Disagreement with the Schedule for Submission of Additional Evidence. (DX 23). The claim was awarded by Proposed Decision and Order on May 7, 2003. (DX 24). The District Director found that Claimant had established all of the elements necessary to entitle him to benefits under the Act and that Claimant was a coal miner within the meaning of the Act for thirty-seven (37) years. (DX 24). Employer filed a timely request for a hearing and on November 20, 2003, the matter was referred to the Office of Administrative Law Judges for a formal hearing. (DX 25 & 28).

After due notice, a formal hearing was held before me in Price, Utah on July 2, 2004. At that time, all parties were afforded a full opportunity to present evidence and argument as provided in the Act and the regulations. At the hearing, Director's exhibits 1-30; Claimant's exhibits 1-5; and Employer's exhibits 1-12 were admitted to the record in this claim. (Tr. 5-6).[1] I have marked the pre-hearing reports of both parties post-hearing for identification. They have been marked as Administrative Law Judge's exhibits 1 and 2. These documents have been admitted to the record. The record is now closed.

The findings of fact and conclusions of law which follow are based upon my thorough analysis and review of the entire record, arguments of the parties and applicable statutes, regulations and case law.

Issues

The issues to be adjudicated are: (1) whether Claimant has pneumoconiosis as defined by the Act and the regulations; and if so (2) whether his pneumoconiosis arose out of coal mine employment; (3) whether Claimant is totally disabled; and if so (4) whether that total disability is due to pneumoconiosis; (5) whether Claimant has established a material change in condition. (DX 28, Tr. 6).

Adjudicatory Rules

[1] The following references will be used herein: "CX" designates Claimant's exhibits; "DX" designates Director's exhibits; "EX" designates Employer's exhibits; and "Tr." Designates the transcript of the hearing held on July 2, 2004.

Because this claim was filed in 2002, it is governed by the regulations at 20 C.F.R. Part 718. Under Part 718, the claimant must prove by a preponderance of the evidence that: (1) he suffers from pneumoconiosis; (2) such pneumoconiosis arises out of coal mine employment; (3) he is totally disabled; and (4) the pneumoconiosis contributes to the total disability. 20 C.F.R. §725.202(d)(2)(2001); *Gee v. W.G. Moore & Sons,* 9 BLR 1-4 (1986)(en banc); *Baumgartner v. Director, OWCP,* 9 BLR 1-65 (1986)(en banc). Evidence which is in equipoise is insufficient to sustain the claimant's burden of proof. *Director, OWCP v. Greenwich Collieries, et al.,* 114 S.Ct. 2251 (1994); *aff'g sub nom. Greenwich Collieries v. Director, OWCP,* 990 F.2d 730 (3d Cir. 1993). Failure to establish any one of these elements precludes entitlement to benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Dependents

Claimant is married to Betty Huff. (DX 3 &9). There has been no evidence provided to dispute Betty's status as a dependent of Claimant. Therefore, Claimant has one dependent for purposes of benefit augmentation.

Coal Mine Employment

Claimant alleged thirty-seven and one-half (37 1/2) years of coal mine employment. (DX 3). Employer indicated at the time of the hearing that it is willing to stipulate to thirty-seven (37) years as found by the District Director. (Tr. 8-9). After reviewing the documentation included in the record as well as Claimant's testimony, I find that Claimant was a coal miner, as that term is defined by the Act and the regulations, for a period of thirty-seven (37) years.

Responsible Operator

No evidence has been presented disputing Price River Coal Co. being designated as the responsible operator in this matter. Claimant testified that he last worked as a miner for Employer from August 1969 to October 1982. (Tr. 16). He further testified that he has not been employed by the coal mining industry since that time. (Tr. 16). This contention is supported by the Social Security Administration's records. (DX 7). In consideration of the foregoing information, I find that Price River Coal Co. is the properly designated responsible operator in this claim.

Material Change in Condition

The present claim filed January 22, 2002, was filed more than one year after Claimant's previous claim was denied. Pursuant to 20 C.F.R. §725.309, this claim must be denied as a duplicate claim unless claimant can show that there has been a material change in conditions since the prior denial. If claimant is successful in showing such a change, then his claim must be evaluated under Part 718, *as amended*. *See Dotson v. Director, OWCP,* 14 B.L.R. 1-10 (1990) (en banc). This claim is governed by the law of the United States Court of Appeal for the 10th Circuit Court of Appeals for establishing a change in condition.

The District Director has advised that the file associated with Claimant's prior claim for benefits was destroyed in its entirety in January 2000. (DX 1). After diligent attempts by this Court, the decision in Claimant's prior claim for benefits could not be located. Because the file was destroyed in January 2000, it is safe to assume that Claimant's current claim for benefits was filed more than one year after the prior denial of benefits. Therefore, all of the evidence included in Claimant's current claim for benefits will be reviewed de novo.

Pneumoconiosis and Causation

The presence of pneumoconiosis, as defined at 20 C.F.R. §718.201, is determined under the criteria at 20 C.F.R. §718.202(a)(1)-(4). In this claim, there is no autopsy or biopsy evidence and none of the referenced presumptions are applicable. Thus, the presence of pneumoconiosis must be established by chest x-rays or reasoned medical opinions under §718.204(a)(1) or (4), respectively.

Under the provisions of §718.202(a)(1), chest x-rays that have been taken and evaluated in accordance with the requirements of §718.102 may be used as a basis for a finding of the existence of pneumoconiosis. Under §718.202(a)(1), when two or more x-ray reports are in conflict, consideration must be given to the radiological qualifications of the physicians interpreting the x-rays. *See Herald v. Director, OWCP,* BRB No. 94-2354 BLA (Mar. 23, 1995)(unpublished).

The following chest x-ray readings are in the record:

Ex. No.	Date of x-ray	Physician/Qualifications[2]	Impression
DX 15	4/1/02	Lawerence, BCR/B	Negative
DX 16	4/1/02	Navani, BCR/B	Read for quality only
EX 2	5/24/04	Morrison, B	Negative
EX 3	10/1/03	Morrison, B	Negative

Readers who are board-certified and/or B-readers are classified as the most qualified. The qualifications of a certified radiologist are at least comparable to if not superior to a physician certified as a B-reader. *Roberts v. Bethlehem Mines Corp.,* 8 B.L.R. 1-211, 1-213 n.5

[2] The symbol "B" denotes a physician who was an approved "B-reader" at the time of the x-ray reading. A B-reader is a radiologist who has demonstrated his expertise in assessing and classifying x-ray evidence of pneumoconiosis. These physicians have been approved as proficient readers by the National Institute of Occupational Safety & Health, U.S. Public Health Service pursuant to 42 C.F.R. §37.51 (1982).

The symbol "BCR" denotes a physician who has been certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc. or the American Osteopathic Association. 20 C.F.R. §727.206(b)(2)(iii).

(1985). Greater weight may be accorded to x-ray interpretations of dually qualified physicians. *Sheckler v. Clinchfield Coal Co.,* 7 B.L.R. 1-128, 1-131 (1984).

None of the chest x-ray readings are positive for the existence of pneumoconiosis. In light of the foregoing, I find that Claimant has failed to establish the existence of pneumoconiosis by a preponderance of the chest x-ray evidence.

Pursuant to §718.202(a)(4), a claimant may also establish the existence of pneumoconiosis, notwithstanding negative x-rays, by submitting reasoned medical opinions establishing the existence of pneumoconiosis. However, this regulation further provides that any such finding by a physician must be based on objective medical evidence. The physician opinion evidence submitted in this claim is summarized below.

At the time of the hearing in this matter, Dr. Robert Farney testified regarding Claimant's condition. Dr. Farney is board certified in internal medicine and pulmonary disease. (Tr. 53) Dr. Farney examined Claimant on May 24, 2004 at which time, Dr. Farney noted Claimant's last coal mine employment, job duties, smoking history and current symtomology. (Tr. 51-60). In explaining Claimant's smoking history, Dr. Farney corrects a typographical error in his report to state that Claimant smoked cigarettes from age 10 or 12 until 1992. (Tr. 59).

Dr. Farney discussed Claimant's history of lung cancer at the hearing. Dr. Farney stated that the treatment undergone by Claimant for his condition resulted in collateral damage to the healthy parts of Claimant's lungs resulting in scarring and fibrosis. (Tr. 61). Dr. Farney further stated that it is possible to differentiate between damage from fibrosis as a result of radiation treatment and pneumoconiosis. (Tr. 61). Dr. Farney attributes the damage to Claimant's lungs to the radiation treatment. (Tr. 61- 64). Dr. Farney found no chest x-ray evidence of the existence of pneumoconiosis nor did he find any "clinical, medical pneumoconiosis, fibrotic lung disease." (Tr. 84-85). Dr. Farney diagnosed Claimant as suffering from chronic obstructive pulmonary disease "manifest as emphysema and mild bronchitis." (Tr. 85). Dr. Farney attributes these conditions to Claimant's extensive smoking history. (Tr. 85).

Dr. Farney's report of his May 24, 2004 examination is also included in the record in this matter. (EX 1). Dr. Farney's report indicates the substance of his hearing testimony.

A CT scan of Claimant's thorax is also included in the record in this matter. (EX 2). The May 24, 2004 CT scan showed that Claimant was status post left thoracotomy and partial resection of the left lung. Dr. Morrison, who interpreted the CT scan found no evidence of pneumoconiosis.

Claimant was examined by Dr. Jean Maurice Poitras on April 19, 2002. (DX 11) Dr. Poitras is board certified in internal medicine. (CX 3). Dr. Poitras noted thirty-seven (37) years of coal mine employment. Dr. Poitras also noted that Claimant smoked less than one pack of cigarettes per day from 1939 through 1993. Based upon his examination, chest x-ray, pulmonary function study, arterial blood gas testing, electrocardiogram, Claimant's symptoms and work history, Dr. Poitras diagnosed Claimant as suffering from obstructive lung disease with a

restrictive component as a result of Claimant's coal mine employment and approximately fifty (50) pack year history. Dr. Poitras also diagnosed a chest mass suspected to be cancer.

Dr. David Nichols issued a report dated March 29, 2004. (CX 1). Dr. Nichols is board certified in internal medicine. Dr. Nichols has been Claimant's treating physician since 1992. Dr. Nichols noted thirty-seven (37) years of coal mine employment and a fifty-four (54) pack year history of cigarette smoking. After outlining and discussing Claimant's prior treatment and medical history, Dr. Nichols concluded that Claimant suffers from chronic obstructive pulmonary disease as a result of exposure to coal dust as well as his cigarette smoking history.

Dr. Brian Tudor offered a consultation report in this matter dated August 12, 2002. (EX 9). Dr. Tudor noted a sixty (60) pack year history of cigarette smoking. Dr. Tudor diagnosed stage IV non-small cell lung cancer. Dr. Tudor ordered a chest x-ray that showed a large, right-sided suprahilar mass with no other abnormalities.

On May 29, 2004, Dr. Michael Pearce offered a consulting report on Claimant's condition. (EX 10). Dr. Pearce noted that Claimant had been a coal miner for the majority of his life and had a fifty (50) pack year history of cigarette smoking. Dr. Pearce concluded that Claimant presented for evaluation of a right hilar mass and chronic cough.

Doctors Poitras and Nichols, both of which are board certified in internal medicine found that Claimant is suffering from pneumoconiosis. Further, Dr. Nichols' opinion is entitled to special weight because of his relationship with Claimant as his treating physician. Dr. Nichols has been Claimant's physician since 1992, treating Claimant for a variety of ailments which include Claimant's respiratory conditions. Dr. Nichols has treated Claimant in excess of twenty-nine times since 1992 and is therefore in a unique position to assess Claimant's physical condition. *See* 20 C.F.R. § 718.104(d)(2001). Both physicians diagnosed Claimant as suffering from chronic obstructive pulmonary disease which is included in the statutory definition of pneumoconiosis as a result of both Claimant's coal mine employment and cigarette smoking history.

Dr. Farney did not find the existence of pneumoconiosis and bases Claimant's pulmonary condition on only Claimant's smoking history. Doctors Tudor found no significant abnormalities other than lung cancer at the time of his review. Dr. Pearce makes no mention of pneumoconiosis and therefore, his opinion can be considered negative for the existence of pneumoconiosis. Additionally, Dr. Morrison's review of Claimant's CT scan is negative for the existence of pneumoconiosis.

Based on the weight of the foregoing evidence, I find that Claimant has established the existence of pneumoconiosis pursuant to §718.202(a)(4). Therefore, I find that Claimant has established by a preponderance of the physician opinion evidence that he suffers from pneumoconiosis arising out of his coal mine employment.

Considering all of the evidence of record regarding the existence of pneumoconiosis, I find the physician opinion evidence to be the most persuasive when considering all of Claimant's former and current respiratory conditions. Claimant has established the existence of

pneumoconiosis as required under the Act, and as such I find that Claimant has established the existence of pneumoconiosis arising out of coal mine employment.

Total Disability

Benefits under the Act are provided for miners who are totally disabled due to pneumoconiosis. A miner shall be considered totally disabled if the irrebuttable presumption of §718.304 applies. The irrebuttable presumption set forth at Section 718.304 provides that if a miner is suffering from a chronic dust disease of the lungs that yields one or more large opacities on chest x-ray which would be classified as Category A, B or C or one or more massive lesions on biopsy, then such miner shall be presumed to be totally disabled due to pneumoconiosis. 20 C.F.R. §718.204(b), 20 C.F.R. §718.304. There is no such evidence of record and thus total disability is not established by the irrebuttable presumption of §718.304 as provided in §718.204(b).

Total disability may also be established if pneumoconiosis prevents a miner from performing his usual coal mine work or comparable and gainful employment. 20 C.F.R. §204(b). In the absence of contrary probative evidence, evidence which meets one of the standards of §718.204(b)(2)(i)-(iv), may establish a miner's total disability. I note at the outset that subsection (b)(2)(iii) is not applicable because there is no evidence that Claimant suffers from cor pulmonale with right-sided congestive heart failure.

Pulmonary function studies can establish total disability where the values are equal to or less than those listed in Table B1 in Appendix B to Part 718. An assessment of these results is dependent on Claimant's height which is recorded as 64.5 and 65 inches. Considering this discrepancy, I find Claimant's height to be 64.75 inches for the purposes of evaluating the pulmonary function studies. *Protopassas v. Director, OWCP,* 6 B.L.R. 1-221 (1983). The following pulmonary function studies have been submitted in this claim:

Ex. No.	Date	Physician	Age/Height	FEV1[3]	FVC	MVV
CX 4	6/7/84	Farney	63/64.5"	1.81 1.86*	2.85 2.85*	62.3 56.6*
EX 12	12/21/92	King	71/65"	1.74 1.83*	2.46 2.57*	66 63*
DX 13[4]	4/18/02	Poitras	81/65"	1.30 1.37*	2.08 2.39*	NR[5] NR
EX 1&4	5/24/04	Farney	83/64.5"	1.05 1.26*	2.07 2.05*	38 N/R

[3] An "*" indicates that the test results were obtained after the administration of bronchodilator medication.
[4] This pulmonary function study was reviewed by Dr. Timothy Kennedy who is board certified in internal medicine and pulmonary disease. Dr. Kennedy noted that a MVV reading was not completed.
[5] The "NR" indicates that the results of this testing were not recorded on the exhibit.

Dr. Farney opined that the June 7, 1984 pulmonary function study exhibits acceptable tracings, but the tracings are not attached to the report. Dr. Farney also notes that this study shows mild airflow limitation and a drop in vital capacity. (CX 4). Dr. Farney's May 24, 2004 pulmonary functions study was interpreted by the doctor as indicating air trapping and a markedly reduced diffusion capacity. (EX 1). Dr. Crapo interpreted Dr. Farney's May 24, 2004 pulmonary function study to show a moderate airway obstruction with a marked increase after the administration of bronchodilators. (EX 4). Dr. Crapo further stated that a normal total lung capacity existed with severe pulmonary air trapping. Dr. King found that Claimant's December 21, 1992 testing showed no obstruction, mild restriction and no clear improvement post bronchodilator. (EX 12).

I accord little to no weight to the pulmonary function studies dated June 7, 1984 and December 21, 1992 because the tracings for these tests are not included in the record in this matter. Therefore, it is impossible to determine the reliability of this testing. *Estes v. Director, OWCP,* 7 B.L.R. 1-414 (1984). The remaining two tests produce qualifying values under the applicable regulation. Therefore, I find that Claimant has established the existence of a totally disabling respiratory condition by a preponderance of the pulmonary function study evidence.

Under the provisions of subsection 718.204(b)(2)(ii), a claimant can establish total disability if the arterial blood gas tests show values conforming to Appendix C to Part 718. The following blood gas studies have been submitted:

Ex. No.	Date	Physician	PCO2[6]	PO2
CX 5	6/7/84	Farney	35.2	63
EX 11	12/21/92	King	41.8	56.2
DX 12[7]	4/1/02	Poitras	43 45*	58 55*
EX 5	5/24/04	Farney	37.7	67

Only one of the blood gas studies produced a value indicative of total disability. Accordingly, I find that total disability has not been established pursuant to 20 C.F.R. §718.204(b)(2)(ii).

The final means of establishing total disability is pursuant to 20 C.F.R. §718.204(b)(2)(iv), which provides that total disability may be established if a physician exercising reasoned medial judgment, based on medically acceptable clinical and laboratory

[6] An "*" indicates that the test results were obtained after the administration of exercise.

[7] Dr. Timothy Kennedy, who is board certified in internal medicine and pulmonary disease, reviewed the April 1, 2002 arterial blood gas and found it to be technically acceptable.

diagnostic techniques, concludes that a respiratory or pulmonary impairment prevents the miner from engaging in his usual coal mine work or comparable gainful work.

All of the physicians of record agree that Claimant is totally disabled from a respiratory standpoint. (DX 10, CX 1, EX 1). The physicians only differ on the etiology of Claimant's totally disabling respiratory impairment.

Etiology of Total Disability

In a part 718 claim, such as this, Claimant has the burden of proving not only total disability, but also that the total disability is due to pneumoconiosis. Even if the arterial blood gas tests and pulmonary function studies are qualifying to prove total disability, the Board has consistently held that blood gas tests and pulmonary function studies are not diagnostic of the etiology of respiratory impairment, but are diagnostic only of the severity of the impairment. *Tucker v. Director, OWCP,* 10 B.L.R. 1-35, 1-41 (1987). Thus a claimant who established total disability through arterial blood gas tests or pulmonary function studies has not also established that the disability is due to pneumoconiosis. *Id.*

Doctors Poitras and Nichols both found that Claimant's total respiratory disability is a result of both his cigarette smoking and his coal dust exposure. Dr. Farney found that Claimant's total respiratory disability was a result of his cigarette smoking history. I find the opinions of Drs. Poitras and Nichols to be better reasoned and more credible based on the objective medical evidence. Accordingly, I find that Claimant has established that his total respiratory disability arose out of his coal mine employment.

Entitlement

Claimant has established all of the elements of entitlement pursuant to the Act. Therefore, I find that Claimant is entitled to all of the benefits afforded to him under the Act.

Commencement of Benefits

As I have found that Claimant is totally disabled due to pneumoconiosis arising out of coal mine employment, he is entitled to black lung benefits. Benefits are payable to a miner who is totally disabled due to pneumoconiosis beginning with the month of onset of disability. Where onset cannot be determined, benefits commence with the date the claim was filed. §725.303(b). I find that the evidence of record does not establish the date of onset of Claimant's disability, but that such date was not before the date Claimant filed his most recent petition for modification. Therefore, benefits shall commence as of January 2002, the month and year in which the most recent petition for modification was filed.

Attorney's Fees

No award of attorney's fees for services to Claimant is made herein because no fee application has been received. Thirty (30) days is hereby allowed to Claimant's counsel for the submission of a fee application which must conform to §§725.365 and 725.366 of the regulations. A service sheet showing that service has been made upon all parties including

Claimant must accompany the application. Parties have ten (10) days following receipt of such application within which to file any objection. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

The claim of Verl W. Huff for benefits under the Act is AWARDED.

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RICHARD K. MALAMPHY
Administrative Law Judge

RKM/JM
Newport News, Virginia